

EXECUTIVE OFFICERS SUMMARY REPORT
9:00 a.m, February 27, 2003
River Lodge Conference Center
1800 Riverwalk Drive
Fortuna, California

ITEM: 16

SUBJECT: Petition for Enforcement Action, filed by the Environmental Protection Information Center and Humboldt Watershed Council.

On February 24, 2003, the Environmental Protection Information Center and the Humboldt Watershed Council (both hereinafter Petitioners) submitted a Petition for Enforcement Action (Petition) in Freshwater Creek. The Petition was submitted during Item 3A of the Board meeting, which was a request by Pacific Lumber Company for the Regional Water Board to waive waste discharge requirements for specific plans in the Freshwater Creek watershed. These plans involved harvesting units for which the Executive Officer had determined a waiver was not applicable, and the plans should be covered by waste discharge requirements. However, Pacific Lumber Company had interpreted the December 19, 2002, Executive Officer's revocation of all waivers¹ in Freshwater Creek and request for a report of waste discharge on several plans as not precluding timber harvesting or other actions, such as road or landing re-surfacing, where the Company believed no discharge would occur.

At issue is the meaning of California Water Code (CWC) § 13264, which states that no person shall "initiate" a new discharge except as specified:

§ 13264. Prerequisites to discharge

(a) No person shall initiate any new discharge of waste or make any material changes in any discharge, or initiate a discharge to, make any material changes in a discharge to, or construct, an injection well, prior to the filing of the report required by Section 13260 and no person shall take any of these actions after filing the report but before whichever of the following occurs first:

(1) The issuance of waste discharge requirements pursuant to Section 13263.

(2) The expiration of 120 days after compliance with Section 13260 if any of the following applies:

(A) The project is not subject to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

¹ The letter revoked waivers of waste discharge requirements for timber harvest plans in Freshwater Creek, except for the following:

- a. THP 1-01-325 HUM (Morton's Loop) as waived on December 10th by Order No. R1-2002-0111
- b. THP 1-01-378 HUM (Horseshoe) as waived on December 10th by Order No. R1-2002-0111
- c. THP 1-01-428 HUM (On the Road) provided that, in submitting the report of waste discharge called for on December 19, 2002, that Pacific Lumber Company apply for and fulfill the waiver requirements contained in Order No. R1-2002-0109, and the Executive Officer reviews such application and concludes that a waiver of waste discharge requirements for this plan is appropriate.
- d. Portions of THP-1-01-411 HUM (George Cloney) for plan units one (1) and two (2), provided that, in submitting the report of waste discharge called for on December 19, 2002, that Pacific Lumber Company apply for and fulfill the waiver requirements contained in Order No. R1-2002-0109, and the Executive Officer reviews such application and concludes that a waiver of waste discharge requirements for this plan is appropriate.

- (B) *The regional board is the lead agency for purposes of the California Environmental Quality Act, a negative declaration is required, and at least 105 days have expired since the regional board assumed lead agency responsibility.*
 - (C) *The regional board is the lead agency for the purposes of the California Environmental Quality Act, and environmental impact report or written documentation prepared to meet the requirements of Section 21080.5 of the Public Resources Code is required, and at least one year has expired since the regional board assumed lead agency responsibility.*
 - (D) *The regional board is a responsible agency for purposes of the California Environmental Quality Act, and at least 90 days have expired since certification or approval of environmental documentation by the lead agency.*
- (3) *The regional board's waiver pursuant to Section 13269.*
- (b) *The Attorney General, at the request of a regional board, shall petition the superior court for the issuance of a temporary restraining order, preliminary injunction, or permanent injunction, or combination thereof, as may be appropriate, prohibiting any person who is violating or threatening to violate this section from doing any of the following, whichever is applicable:*
 - (1) *Discharging the waste or fluid.*
 - (2) *Making any material change in the discharge.*
 - (3) *Constructing the injection well.*

Commencement of activities which generally lead to the discharge of waste is, in staff's opinion, the initiation of a discharge of waste. It would be a nonsensical reading of the applicable law to allow the discharge-causing activity to proceed before any controls are in place to address the discharge that will result from the activity. [See Water Code §§ 13260 (which refers to wastes discharged that "could affect" water quality), 13263 (which refers to the need to "prevent" nuisance), and 13264 (which says no person shall "initiate" a new discharge except as specified); See also, Pub. Resources Code §§ 4514.3 (making clear a Legislative presumption that "timber operations" are subject to waste discharge requirements unless waived) and 4527 (defining "timber operations" to include, among other things, the "cutting or removal or both of timber or other solid wood forest products... together with all the work incidental thereto"). In summary, initiation of a discharge prior to obtaining waste discharge requirements, or waiver thereof, would be contrary to CWC § 13264.

Timber harvesting activities commence with timber cutting, and the Regional Water Board would be constrained from its full ability to implement waste discharge requirements pursuant to CWC § 13263 if tree cutting occurred after requesting a report of waste discharge and prior to issuing waste discharge requirements, or waiver thereof. The Regional Water Board staff and attorneys were reviewing the options available to the agency for taking an action which would halt further cutting of timber until the Regional Water Board considered and issued waste discharge requirements. As staff indicated to Pacific Lumber Company, this matter is not trivial, for in the regulatory world of pollution prevention actions for non-point source discharges, CWC § 13264 would have little meaning if the activities which lead to the discharge are not also subject to the prohibition against the commencement of those activities.

The options included issuance of a cleanup and abatement order to abate a threatened discharge, as well as the potential for the Attorney General to seek a temporary restraining order, as provided for in CWC §13264(b).

Significant media coverage on the continued cutting by Pacific Lumber Company occurred while staff was reviewing the available options, with media calls starting at the close of the Regional Water Board meeting on January 24th, when some Board Members expressed frustration with the continuing tree cutting activities. Attachment 1 is a compilation of some of the news articles.

Pacific Lumber Company notified us on January 29, 2003, that cutting had been halted, making further actions by Regional Water Board staff unnecessary.

CWC § 13264(b) and § 13265 provides the remedy for the Regional Water Board for violations of Section 13264 (a), and those remedies are cited in the Petition:

- Seek a temporary restraining order per CWC § 13264(b): This need is made moot by the actions of Pacific Lumber Company in halting cutting.
- Assess civil monetary remedies pursuant to CWC § 13265: The first requirement of this section is that remedies can be sought when the violation continues after “such violation has been called to [the discharger’s] attention in writing.” Staff sent a letter to Mr. Robert Manne on January 30, 2003, that gave notice under CWC § 13265, and such notice would have been the first written notification of a violation of CWC § 13264. Accordingly, no civil liabilities are appropriate under CWC § 13267 since Pacific Lumber halted the activities before or at the same time as receiving notice.

Given the facts of this matter, the Regional Water Board staff does not recommend any further enforcement actions at this time.

PRELIMINARY STAFF

RECOMMENDATION:

The staff recommends dismissing the Petition filed by the Environmental Protection Information Center and the Humboldt Watershed Council.